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Supreme Court of the United States

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No.

STATE OF ALASKA; ROBERT ALLEN VENABLE, executor of the will and estate of R. H. Venable, deceased; and D. D. HARRINGTON,

Petitioners,

vs.

UNITED STATES OF AMERICA, ALASKA EXPLORATION CORPORATION,

Respondents.

PETITION FOR A WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit

To the Honorable Warren Burger, Chief Justice, and to the Honorable Associate Justices of the Supreme Court of the United States:

Your petitioners, the State of Alaska, Robert Allen Venable, executor of the will and estate of R. H. Venable, deceased, and D. D. Harrington, respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The District Court for the District of Alaska delivered a Memorandum of Decision and Order on October 15, 1968, which is not reported. (App. A, infra, p. i). Judgment was entered pursuant thereto on October 30, 1968. (App. B, infra, p. v).

The United States Court of Appeals for the Ninth Circuit delivered a written opinion on March 20, 1970, reported at ..... F.2d ..... (App. C, infra, p. viii).

JURISDICTION

The judgment of the Court of Appeals (App. D, infra, p. xviii) was entered on March 20, 1970. A timely petition for rehearing was denied April 29, 1970 (App. E, infra, p. xix).

The jurisdiction of this Court is invoked under 28 USC 1254(1).

QUESTIONS PRESENTED

Respondent's complaint sought to quiet title against the State of Alaska and its grantees to the lands underlying Tustumena Lake, a navigable body of water lying within the outer boundaries of an area withdrawn by executive order prior to Alaska's statehood. The following questions of law are presented:

1. Whether the President of the United States had the summary power to withhold from a newly created state lands beneath inland navigable water which

theretofore were held in trust by the United States for the future state.

2. Whether, if the President possessed such power, he effectively exercised it in issuing Executive Order No. 8979 so as to retain in the United States title to the bed of Tustumena Lake.

STATUTES INVOLVED

The last proviso of the Act of May 14, 1898, Section 2, 30 Stat. 409, 40 U.S.C. § 411, provides:

> *Provided*, That nothing in this Act contained shall be construed as impairing in any degree the title of any State that may hereafter be erected out of said District, or any part thereof, to tide lands and beds of any of its navigable waters, or the right of such State to regulate the use thereof, nor the right of the United States to resume possession of such lands, it being declared that all such rights shall continue to be held by the United States in trust for the people of any State or States which may hereafter be erected out of said District. The term "navigable waters," as herein used, shall be held to include all tidal waters up to the line of ordinary high tide and all nontidal waters navigable in fact up to the line of ordinary high-water mark. That all charges for the transportation of freight and passengers on railroads in the District of Alaska shall be printed and posted as required by section six of an Act to regulate commerce as amended on March second, eighteen hundred and eighty-nine, and such rates shall be subject to revision and modification by the Secretary of the Interior.

The Act of July 7, 1958, Section 1, 72 Stat. 339, provides in part:

> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That, subject to the provisions of this Act, and upon issuance of the proclamation required by section 8(c) of this Act, the State of Alaska is hereby declared to be a State of the United States of America, is declared admitted into the Union on an equal footing with the other States in all respects whatever, ...

STATEMENT

On December 6, 1941, the President withdrew land and water of the United States for the Kenai National Moose Range in Alaska by Executive Order No. 8979 (6 Fed. Reg. 6471). (App. F, infra, p. xx).

The withdrawal encompassed approximately 2,000,000 acres described by metes and bounds. Some portions of the withdrawn area remained available for use and disposition under the public land laws and the entire withdrawal was made "subject to valid existing rights." It was also provided, in part, "that any lands within the described area that are otherwise withdrawn or reserved shall be affected by this order only so far as may be consistent with the uses and purposes for which such prior withdrawal or reservation was made." Tustumena Lake, a navigable body of water, is located within the outer boundaries of the withdrawal.

On January 3, 1959 Alaska entered the Union. In 1966, the State of Alaska issued oil and gas leases to portions of the lands beneath Tustumena Lake. Respondent Alaska Exploration Corporation is a lessee of the state which does not join in this petition.

On November 6, 1967 the United States filed an action to quiet title to the lands in question against the state and its lessees. Motions for summary judgment were filed by all parties and on October 15, 1968 the District Court for the District of Alaska granted the State's and its lessees' Motions for Summary Judgment. Judgment was entered on October 30, 1968.

The United States appealed the decision to the Court of Appeals for the Ninth Circuit on December 27, 1968. In its opinion the Court of Appeals held without discussion that the President was authorized to withhold land from a future state for such a purpose and in such a manner, and found from an examination of the circumstances that he intended to do so. Judgment was entered by the Court of Appeals on March 20, 1970 reversing the judgment of the District Court and remanding the cause for entry of summary judgment in favor of the United States.

REASONS

I

THIS MATTER INVOLVES AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THE SUPREME COURT OF THE UNITED STATES.

In none of the many cases decided by this Court relating to ownership of lands beneath inland navigable waters has the Court held that the mere declaration of an executive officer that certain land in a territory is to be devoted to a special purpose is sufficient to retain title to the land in the United States upon the territory's achievement of statehood.

On January 3, 1959, Alaska was admitted to the Union on an equal footing with the other States (see Alaska Statehood Act, 72 Stat. 339, Section 1). The application of the "equal footing" doctrine has been discussed by this Court on many occasions. It is applicable to political rights and sovereignty. While it does not apply to all property matters it does apply to lands beneath navigable waters, ownership of which has long been regarded as one of the attributes of sovereignty. See *U.S. v. Texas,* 339 U.S. 707, 716-717 (1950). The sovereign rights of states cannot be bargained away as conditions of admission to the Union. In *Coyle v. Smith,* 221 U.S. 559 (1911), the Court found violative of the equal footing doctrine a provision of the Oklahoma Statehood Act fixing the place of the State capital. It held that no condition could be imposed in a statehood act, even if acquiesced in by the state, unless such a provision could validly have been imposed by Congress after statehood. (221 U.S. at 573).

That ownership of navigable waters and the lands beneath them is an attribute of sovereignty, distinct from other property rights, has long been established. *Martin v. Waddells' Lessee,* 16 Pet, 367 (1842). The original thirteen States were sovereign owners of navigable waters and lands beneath them, and did not give up to the Federal Government its dominion over such lands, except as necessary for the regulation of commerce. *U.S. v. Oregon,* 295 U.S. 1, 14 (1935). Newly admitted states, entering the union on an equal footing with the original thirteen, assume ownership of such lands as an incident of their sovereignty. *Pollard v. Hagan,* 44 U.S. 212 (1845). While holding such lands prior to the creation of states, the United States holds them in trust for the people of the future states, disposing of them only when "necessary to do so in order to perform international obligations, or to effect the improvement of such lands for the promotion and convenience of commerce with foreign nations and among the several states, or to carry out other public purposes appropriate to the objects for which the United States holds the territory." *Shivley v. Bowlby,* 151 U.S. 1 (1893).

In its Opinion the Court of Appeals appears to have accepted the proposition that the United States has the power to withhold lands under navigable waters prior to Statehood for any public purpose and to treat them as ordinary public domain. This Court has never so held. In each case in which the power of the United States to convey or encumber navigable waters and the lands beneath them has been considered by this Court, the land in question was either granted

pursuant to an Act of Congress or pursuant to obligations of treaties. In none of the cases was the withholding or conveying the simple act of an executive officer of the United States without specific authorization of Congress or of a treaty. See for example, *Alaska Pacific Fisheries v. U.S.*, 248 U.S. 78 (1918) (Congressionally established Indian reservation); *Brewer-Elliott Oil Co. v. U.S.*, 260 U.S. 77 (1922) (Congressional grant to Indians); *Cherokee Nation or Tribe of Indians v. Oklahoma*, ... U.S. ..... (1970), 25 L.ed.2d 615 (Indian treaties); *Hynes v. Grimes Packing Co.*, 337 U.S. 86 (1949) (Executive order pursuant to statutory authority to create Indian reservations); *Shively v. Bowlby*, 152 U.S. 1 (1894) (General land law disposal rejected); *U.S. v. Holt State Bank*, 270 U.S. 49 (1926) (Indian reservation and related legislation).

The Congress, in exercising its plenary powers over public lands of the United States (Constitution, Article IV, Section 3, Cl. 2) has never enacted general laws authorizing disposition of lands beneath navigable waters. (*Shively v. Bowlby*, supra, at 48.) It has, in fact, given specific recognition to the capacity in which the United States held lands in the Territory of Alaska when it appended the last proviso to § 2 of the Act of May 14, 1898 (30 Stat. 409, 40 U.S.C. § 411) extending the homestead laws to the Territory.

The Court of Appeals has failed to give consideration to the purpose for which the withdrawal was made, and the manner in which it was made, in the light of the many decisions of this Court in related situations. The Court of Appeals neither sought to

bring this case within the settled decisions of this Court, nor to recognize the issue for what it is, a question which has not previously been decided by this Court.

II

THE DECISION OF THE COURT OF APPEALS IS DIRECTLY CONTRARY TO A DECISION OF THIS COURT

The Court of Appeals based its decision upon its determination that the President of the United States in 1941 must have intended to include submerged lands in his withdrawal order and therefore he did so. The Court said:

> . . . We commence with the fundamental premise that one of the most important factors in resolving the meaning of the pertinent language is to place ourselves, insofar as possible, in the posture of the President and surround ourselves with the factual atmosphere in which the Kenai Moose Range was created. . . . [Decision, page 4.]

The Court of Appeals thereupon brushed aside this Court's holding in *United States v. Holt State Bank*, 270 U.S. 49 (1926) by saying:

> . . . We have no difficulty in placing the language of the withdrawal Order within the meaning of 'or otherwise made very plain.' [Decision, page 5.]

The rule laid down by this Court in *Holt State Bank* requires that the conveying instrument itself evince the "very plain" basis for the disposal. In that case, this Court held, at 55:

> . . . the United States early adopted and constantly has adhered to the policy of regarding lands under navigable waters in acquired terri-

> tory, while under its sole dominion, as held for the ultimate benefit of future states, and so has refrained from making any disposal thereof, save in exceptional instances when impelled to particular disposals by some international duty or public exigency. It follows from this that disposals by the United States during the Territorial period are not lightly to be inferred, and should not be regarded as intended unless the intention was definitely declared or otherwise made very plain.

Contrary to the foregoing rule, the Court of Appeals intuitively supplied necessary intent notwithstanding the complete absence of evidence of such intent in Executive Order 8979.

The background for the rule of *Holt State Bank* has been traced by the Tenth Circuit in a recent decision. *Cherokee Nation or Tribe of Indians v. State of Oklahoma,* 402 F.2d 739 (C.C.A. 10, 1968), (Reversal on other grounds, ... U.S. ..... (1970), 25 L.ed. 2d 615). The Circuit Court said, at 744:

> In Pollard v. Hagan, 44 U.S. (3 How.) 212, 230, the Court held that the Constitution did not pass title of the beds of navigable waters to the United States, but reserved title to the several states. Because new states enter the Union on an equal footing with all other states, title to the beds underlying navigable waters passes to the new states. Shively v. Bowlby, 152 U.S. 1, 48, establishes the power of Congress to grant land below navigable water in a territory when it is necessary 'to perform international obligations, or to effect the improvement of such lands for the promotion and convenience of commerce * * *, or to carry out other public purposes appropriate

> to the objects for which the United States hold the Territory.' The decision in United States v. Holt State Bank, 270 U.S. 49, 55, recognizes the rule stated in Shively v. Bowlby and adds that the United States has refrained from making such disposition except 'in exceptional circumstances' and that disposals during the territorial period 'are not lightly to be inferred, and should not be regarded as intended unless the intention was definitely declared or otherwise made very plain.'

The rule of *Holt State Bank* was further applied by this Court in *Alaska Pacific Fisheries v. United States*, 248 U.S. 78 (1918), wherein abundant factual information was supplied regarding the history, habits and needs of the Metlakatla Indians to show intent to include the submerged lands within the reservation. See also, *Hynes v. Grimes Packing Co.*, 337 U.S. 86 (1948); *Moore v. United States*, 157 F.2d 760 (C.A. 9, 1946), *cert. den.*, 330 U.S. 827 (1946); *United States v. State of Oregon*, 295 U.S. 1 (1934); *Cherokee Nation, or Tribe of Indians v. State of Oklahoma*, supra.

The Court of Appeals has, by virtue of its failure to follow the rules governing disposition of submerged lands by the federal government, effectively invented a new rule contrary to the *Holt State Bank* rule. The new rule would allow the Courts to determine the already executed intent of the United States regarding disposals of submerged lands in terms of what it *should* have intended and in terms of what would currently be most satisfying to the popular trend of removing and preserving vast areas of public lands in Alaska from ownership by the State of Alaska.

The rule of *Holt State Bank* clearly requires that the United States abide by the limitations set forth or face the possibility that an attempt to otherwise dispose of submerged lands may result in failure. The holding of the Court of Appeals permits circumvention of the limitations of *Holt State Bank* by finding the necessary intent in the *current* assertions of the United States and applying the force of that intent retroactively to 1941.

The impact of such a "new rule" on the State of Alaska would be severe. The present attitude of the United States concerning the ownership of vast areas of submerged lands in Alaska presently under one form of federal dominion or another will dictate the ultimate disposition of those lands. The terms and conditions of the original withdrawal orders would no longer be controlling and the State of Alaska will literally be at the mercy of the United States, awaiting a decision from it as to whether it intends to have or intended to have withdrawn other areas of the State.

There are now some 50 federal withdrawals within the State encompassing over 110 million acres. Within these withdrawals are numerous navigable lakes and streams.

The decision of the Ninth Circuit Court of Appeals will set a precedent which will cause considerable hardships to the State of Alaska. If the current intent of the United States regarding prior dispositions of lands in Alaska during the territorial period is allowed to supplement or supplant already documented intent of past disposals, the State of Alaska

will be denied vast areas of lands and natural resources which it believed itself entitled to as an incident of sovereignty.

It is important that this Court review the decision of the Ninth Circuit to determine if the language of Executive Order No. 8979 alone is sufficient to withhold the submerged lands below Tustumena Lake from ownership by the State of Alaska.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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Attorney General, State of Alaska,
ROBERT L. HARTIG,
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Attorneys for Petitioner
State of Alaska.

ELY, GUESS, RUDD & HAVELOCK,
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Attorneys for Petitioners Robert Allen Venable, executor of the will and estate of R. H. Venable, deceased, and D. D. Harrington.

(Appendices Follow)

Appendix A

In The United States District Court
for the District of Alaska

No. A-152-67 Civil

United States of America,
Plaintiff,
vs.
State of Alaska, et al.,
Defendants.

MEMORANDUM OF DECISION AND ORDER

On December 6, 1941, by Executive Order 8979, all land and water of the United States within the area described therein were withdrawn and reserved to establish the Kenai National Moose Range. On January 3, 1959, the Territory of Alaska was admitted into the Union. In 1966, the State of Alaska issued oil and gas leases to a portion of the land under the waters of Tustumena Lake, a navigable body of water located within the area described in Executive Order 8979. On November 7, 1967, the United States filed this action against the State and its lessees to quiet title to the lands in question. All parties have moved for summary judgment.

The question to be determined is whether the United States effectively withdrew and reserved the land

under the navigable waters of Tustumena Lake by Executive Order 8979.

Executive Order 8979 by its terms limits the area withdrawn and reserved to *land* and water *of the United States*. Lands of the United States include only those lands that are subject to sale or other disposition under the General Lands Laws. Lands under navigable waters were not granted by the Constitution to the United States, but were reserved to the States respectively. On December 6, 1941, title to the land beneath the navigable waters of Tustumena Lake was not owned or vested in the United States but was being held by it in trust for the future State of Alaska.

The United States early adopted and constantly has adhered to the policy of regarding lands under navigable waters in acquired territory, while under its sole dominion, as held for the ultimate benefit of future states, and so has refrained from making any disposal thereof, save in exceptional instances when impelled to particular disposals by some international duty or public exigency. It follows from this that disposals by the United States during the Territorial period are not lightly to be inferred, and should not be regarded as intended unless the intention was definitely declared or otherwise made very plain. *Shively v. Bowlby,* 152 U.S. 1 (1894); *United States v. Holt Bank,* 270 U.S. 49 (1925).

There is nothing in the record from which the Court can infer or imply that the United States by Executive Order 8979 intended to withdraw and re-

serve the lands under navigable waters within the Kenai National Moose Range. Nor is there any indication that the United States gave any consideration to lands underlying navigable waters within this area until the State of Alaska issued oil and gas leases thereon in the year 1966.

The Court holds that the United States did not withdraw and reserve the land underlying the navigable waters of Tustumena Lake by Executive Order 8979, nor did it definitely declare or otherwise make plain its intention to do so. Consequently, on January 3, 1959, by virtue of Public Law 85-508, 72 Stat. 339, the State of Alaska was admitted into the Union with the same rights, sovereignty and jurisdiction over navigable waters and lands under such waters, within its boundaries, as the original thirteen States possess within their respective States.

It is therefore Ordered as follows:

1. Plaintiff's motion for summary judgment is denied.

2. The motions for summary judgment filed by the defendant State of Alaska and the defendants Robert Allen Venable, Executor of the Will and of the Estate of R. H. Venable, deceased, D. D. Harrington, and Alaska Exploration Corporation, are granted.

3. The amended cross-claim filed by defendants Robert Allen Venable, Executor of the Will and of the Estate of R. H. Venable, deceased; D. D. Harrington; and Alaska Exploration Corporation against the defendant State of Alaska is hereby dismissed without prejudice and with right to reinstate within sixty

(60) days from the date of a judgment by the United States Court of Appeals for the Ninth Circuit or the Supreme Court of the United States reversing the judgment of this Court.

4. Counsel for the defendants shall within fifteen (15) days prepare, serve and submit in duplicate proposed forms of judgment.

/s/ Raymond E. Plummer,
United States District Judge

Dated: Oct. 15, 1968.

Copies mailed to:
Marvin S. Frankel, Esq.,
United States Attorney

Attorney General, State of Alaska

Messrs. Ely, Guess, Rudd and Havelock

Filed Oct. 15, 1968,
United States District Court,
District of Alaska.

Appendix B

In The United States District Court
for the District of Alaska

No. A-152-67 Civil

United States of America,
Plaintiff,

vs.

State of Alaska, et al.,
Defendants.

JUDGMENT

The above-entitled action came on regularly for hearing on the 7th day of October 1968, upon plaintiff's Motion for Summary Judgment and defendants' Motions for Summary Judgment; and Edmund B. Clark, United States Department of Justice, appearing on behalf of plaintiff, Robert L. Hartig, Assistant Attorney General, appearing on behalf of the State of Alaska, and Joseph Rudd of Ely, Guess, Rudd & Havelock, appearing on behalf of defendants Robert Allen Venable, Executor of the Will and Estate of R. H. Venable, Deceased, D. D. Harrington, and Alaska Exploration Corporation; and the Court having heard the arguments of counsel and having fully considered the same together with the files and records

herein, and having rendered its Memorandum of Decision and Order on the 15th day of October 1968, denying plaintiff's Motion for Summary Judgment, granting defendants' Motions for Summary Judgment and dismissing the cross-claim against the State of Alaska brought by the remaining defendants; now, therefore,

It Is Ordered, Adjudged, and Decreed:

That the State of Alaska is the owner in fee simple of, and it and those holding under it are entitled to possession of, all land, minerals, and other things underlying the waters of Tustumena Lake in the State of Alaska; that the claims of the plaintiff and all who may claim title under it in and to the said real property are without right; that said plaintiff has no right, title, interest, claim, or estate whatsoever in or upon said real property or any part thereof; and that said plaintiff and all persons who may claim under it are hereby enjoined from claiming or asserting any estate, right, title, interest in or claim upon said real property or any part thereof.

And It Is Further Ordered, Adjudged, and Decreed:

That the Amended Cross-claim of defendants Robert Allen Venable, Executor of the Will and of the Estate of R. H. Venable, Deceased, D. D. Harrington, and Alaska Exploration Corporation against defendant State of Alaska, is hereby dismissed without prejudice and with the right to reinstate within 60 days from the date of the judgment by the United States Court of Appeals for the Ninth Circuit or the

Supreme Court of the United States should this judgment be reversed.

Dated at Anchorage, Alaska, this 30th day of October.

/s/ Raymond E. Plummer,
United States District Judge

Approved as to form and content this 30th day of October, 1968.

/s/ (illegible)
United States Attorney

Approved as to form and content this 28th day of October, 1968.

Ely, Guess, Rudd & Havelock
By: /s/ Joseph Rudd
Joseph Rudd

Approved as to form and content this 29th day of October, 1968.

G. Kent Edwards,
Attorney General of the State of Alaska
By: /s/ Dorothy (illegible) Harlan,
Assistant Attorney General

Copy filed in O. & J. Vol. ..... page 407.

Filed Oct. 30, 1968,
United States District Court,
District of Alaska.

Appendix C

United States Court of Appeals
Ninth Circuit

No. 24001

United States of America, Appellant,

vs.

State of Alaska, et al., Appellees.

[March 20, 1970]

Appeal from the United States District Court
for the District of Alaska

Before: Ely, Kilkenny and Trask, Circuit Judges.

Kilkenny, Circuit Judge:

This appeal grows out of an action by the United States to quiet title to the lands under Tustumena Lake, located in the southern half of the Kenai Moose Range in Alaska, in which action the state of Alaska and certain of its oil and gas lessees are parties defendant. All parties filed motions for summary judgment. All agree that the relevant facts are not in dispute. The trial court entered a summary judgment in favor of appellees on the ground that the land

under the lake passed to the state of Alaska on its admission to the Union.

The events leading up to this litigation may be briefly summarized as follows: The Territory of Alaska was ceded by Russia to the United States in the Treaty of March 13, 1867. On December 6, 1941, President Franklin D. Roosevelt, by Executive Order No. 8979, 6 Fed. Reg. 6471, established the Kenai National Moose Range as a Wildlife Refuge Area. The Order, withdrawing an area of approximately 2,000,000 acres, was promulgated for the purpose of protecting the natural breeding and feeding range of the giant Kenai moose on the Kenai Peninsula, Alaska.[1] The Order withdrew all of the areas of land and water of the United States lying on the northwest portion of the peninsula. In 1956, and again in 1957, oil was discovered in the northern half of the peninsula and on August 2, 1958, the Secretary of the

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[1] . . . . . .

"ESTABLISHING THE KENAI NATIONAL MOOSE RANGE ALASKA

By virtue of the authority vested in me as President of the United States, it is ordered that, *for the purpose of protecting the natural breeding and feeding range of the giant Kenai moose on the Kenai Peninsula, Alaska,* which in this area presents a unique wildlife feature and an unusual opportunity for the study in its natural environment of the practical management of a big game species that has considerable local economic value, all of the *hereinafter-described areas of land and water of the United States* lying on the northwest portion of the said Kenai Peninsula, *be and they are hereby, subject to valid existing rights, withdrawn and reserved for the use of the Department of the Interior and the Alaska Game Commission as a refuge and breeding ground for moose* for carrying out the purposes of the Alaska Game Law of January 13, 1925, 43 Stat. 739, U.S.C., title 48, secs. 192-211, as amended:"

. . . . . .

(Emphasis supplied.)

Interior issued an Order closing the southern half of the Kenai Moose Range to leasing because the leasing of such lands would be incompatible with management thereof for wildlife purposes.[2] Each order was made and entered while Alaska remained a territory of the United States. The submerged lands, the title to which is here in dispute, lie beneath Tustumena Lake, which is located within the area closed to leasing by the Order of August 2, 1958. Alaska did not become a state until January 3, 1959. In 1966, it issued oil and gas leases to segments of the lands beneath the waters of the lake. The lower court was evidently relying on cases construing the general land laws, such as *Mann v. Tacoma Land Co.*, 153 U.S. 273 (1894), in holding that "public lands" did not include the land under the water.

The Act creating a civil government in Alaska, enacted May 17, 1884, 23 Stat. 24, 26, provided, among other things, that the general land la[illegible] of the United States should not be applicable to the Territory of Alaska. In construing the pertinent Alaskan statutes, the courts have consistently held that the words "public domain", "public lands" and "land", include land

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2. . . . . .

"Notice is hereby given that, pursuant to the regulation 43 CFR, 192.9 (Circular 1990), agreement, as reflected by the map herein referred to, has been consummated between the Bureau of Land Management and the United States Fish and Wildlife Service of this Department, designating those lands within the Kenai National Moose Range on the Kenai Peninsula, Alaska, which are hereby closed to oil and gas leasing because such activities would be incompatible with management thereof for wildlife purposes. . . ."

. . . . . .

(Emphasis supplied.) 23 Fed. Reg. 5883.

under water. *Moore v. United States,* 157 F.2d 760 (9th Cir. 1946), *cert. denied,* 330 U.S. 827; *Alaska Pacific Fisheries v. United States,* 248 U.S. 78 (1918); *Hynes v. Grimes Packing Co.,* 337 U.S. 86 (1949). To be recognized, of course, is the fact that many of the general land laws of the United States have been applied to Alaska, but this fact does not mean that those laws have general application or should be here controlling.

Beyond question, the appellant had power, prior to Alaskan statehood, to withhold, withdraw or convey the land and water for any valid purpose. In such case, the property withdrawn would not pass to the state. *Moore v. United States, supra; United States v. Oregon,* 295 U.S. 1 (1935); *Alabama v. Texas,* 347 U.S. 272 (1954). The court below reasoned that the "lands of the United States", mentioned in the Executive Order, included only those lands that were subject to sale or other disposition under the General Land Laws. He likewise reasoned that the lands under navigable waters, such as the waters of the lake in question, were held in trust by the United States for future states and could not constitutionally be withdrawn or withheld by the Congress or by Executive Order of the President acting under a Congressional grant of power, save in exceptional circumstances when impelled to particular disposals by some international duty or public exigency. The court found, in this instance, there was no intent on the part of the United States to withdraw and reserve the submerged land in question. We disagree.

When we cast aside the many illusory contentions introduced and argued by both appellant and appellees, we have for decision a rather homespun issue. Simply stated, the problem before us is whether the questioned Executive Order was intended to include the land under the water of Lake Tustamena. We believe such intention is quite clearly expressed in the language of the Order. We commence with the fundamental premise that one of the most important factors in resolving the meaning of the pertinent language is to place ourselves, insofar as possible, in the posture of the President and surround ourselves with the factual atmosphere in which the Kenai Moose Range was created. The Order specifically withdraws and reserves for the use of the Department of the Interior and the then Alaska Game Commission,[3] as a game refuge, approximately 2,000,000 acres, described by metes and bounds, for the express purpose "of protecting the natural breeding and feeding range of the giant Kenai moose on the Kenai Peninsula, Alaska." The Order then goes on to declare that the area withdrawn "presents a unique wildlife feature and an unusual opportunity for the study in its natural environment of the practical management of a big game species that has considerable local economic value." Withdrawn by the Order was "all of the hereinafter described area of *land and water* of the United States."

The argument that the Order, in withdrawing the "water", did not withdraw the "navigable water", is

[3]A territorial commission.

patently unsound. If all navigable waters, lakes and streams are beyond the effect of the order, only mountains, hills, ridges, valleys and barren areas would remain for the moose to feed and breed. Appellees would have the male and female of this semi-aquatic animal find each other and mate in dense woods and thickets, and on precipitous mountains and cliffs, rather than in or around the tranquil waters of their natural habitat. President Roosevelt never intended such a result, nor did he envison the bulls and cows of this noble group standing on the shores of streams and lakes and there extending their necks to giraffe like proportions in order to enjoy the aquatic vegetation so essential to their continued existence. Water, in other words, is just as essential to the continued existence of the moose as it is to any other semi-aquatic animal in Alaska. If the Order failed to withdraw the navigable water in the designated area, it amounted to nothing more than an impotent gesture. If it failed to withdraw the land under the water, it would be just as sterile. In neither case would this magnificent animal be the beneficiary of the declared design of the Order.

Appellees argue that *United States v. Holt Bank*, 270 U.S. 49 (1926), supports the trial court's conclusion that the submerged land here in question passed to Alaska on its admission to the Union. *Holt Bank* employs the principle that where the United States, after acquiring the territory and before the creation of the state, has granted rights in lands, in carrying out public purposes appropriate to the objects for

which the Territory was held, such rights are not impaired by the subsequent creation of a state, and the rights which otherwise would pass to the state by virtue of its admission to the Union, are restricted and qualified accordingly. As an appendix to this general principle, *Holt Bank* points to *Shively v. Bowlby,* 152 U.S. 1, 47-48, 57-58 (1894), for use of the precept that land under navigable waters in acquired territory is generally held for the ultimate benefit of future states and that disposals by the United States during the territorial period are not lightly to be inferred and should not be regarded as intended unless the intention was definitely declared *or otherwise made very plain.* We have no difficulty in placing the language of the withdrawal Order within the meaning of "or otherwise made very plain". Although the precise question was not involved, the United States Supreme Court in *Udall v. Tallman,* 380 U.S. 1, 4-5 (1965), clearly recognizes that the land in the Kenai Moose Range was specifically reserved to the United States at the time of passage of the Alaska Statehood Act.

The factual background in *Cherokee Nation or Tribe of Indians v. State of Oklahoma,* 402 F.2d 739 (10th Cir. 1968), *cert. granted* 394 U.S. 972, relied on by appellees, in no way parallels the one before us. The issue before that court was whether the provisions of certain Indian Treaties were sufficiently clear to indicate an intent to reserve, in favor of the Indian Nation, the land under the navigable waters of the Arkansas River. The court held that there was nothing

in the pertinent treaties, statutes and conveyances which indicated an intent of the United States, as trustee for the states to be formed, to convey away or reserve property held for the benefit of the new states. Here, we have arrived at the opposite conclusion in relation to the language of the Order before us.

Appellees would have us utilize and here apply the provisions of the Submerged Lands Act, 67 Stat. 29, 43 U.S.C. § 1301, *et seq.*, made applicable to Alaska by the Statehood Act. Specifically excluded from the operation of the Act are ". . . all lands expressly retained by or ceded to the United States when the State entered the Union . . . and any rights the United States has in lands presently and actually occupied by the United States under claim of right." 43 U.S.C. § 1313. The provisions of § 6(e) of the Statehood Act, 72 Stat. 339, 341, specifically exclude all land and water previously withdrawn. Consequently, the Submerged Lands Act has no application.

Admittedly, Alaska was admitted to the Union on an equal footing with other states. However, this does not mean that the President had no power to previously promulgate the Executive Order here under scrutiny. If, as we now hold, the language of the Order is sufficiently clear to withdraw the water of the lake and the submerged land, the state's rights, if any, are subsequent in time and inferior in right to those of the appellant. Alaska, like other states, except possibly the original thirteen, had no indefeasible right to statehood. While holding the country as a

Territory, the United States had all of the powers of a Sovereign and, if it saw fit, might even grant rights in and titles to lands which normally would go to a state on its admission. *Heckman v. Sutter,* 119 Fed. 83, 88 (9th Cir. 1902); *Shively v. Bowlby, supra,* arrive at this result.

Appellees' contention that the withdrawal of the water and land for a moose range was not for a public purpose is tenuous in the extreme. The public purpose to be served by the creation of game refuges has been so widely accepted that our research reveals only one reported case in which the project was challenged on that ground. There, the Minnesota Supreme Court had no difficulty in holding that an area set aside to preserve wildlife was for a public purpose. *Lyman v. Chase,* 226 N.W. 633, 178 Minn. 244 (1929). The fact that the Congress under § 6(e) of the Alaska Statehood Act reserved to the United States "lands withdrawn or otherwise set apart as refuges or reservations for the protection of wildlife," demonstrates beyond rational debate a congressional belief that such areas were set aside for public purposes. The contention is so completely without merit it deserves no additional discussion.

Almost as chimerical is appellees' argument that the passage of the Alaskan Game Laws, 43 Stat. 739, *et seq.,* in 1925, and subsequent enactments, 46 Stat. 1111 (1931) and 52 Stat. 1169 (1938), in some unexplained manner eroded or destroyed the power of the Executive to issue the 1941 Order. The fact that hunting may be permitted in some areas of the refuge is to

us of no significance. We take notice of the fact that at times over-population develops in certain areas and that controlled hunting is part and parcel of good game management. Unless the population is controlled, the food supply may completely disappear, thus endangering the entire herd.

Other points raised by appellees are less meritorious than those just now discussed.

The judgment of the lower court is set aside. The cause is remanded to the district judge to enter a summary judgment in accordance with the prayer of appellant's complaint.

Appendix D

United States Court of Appeals
for the Ninth Circuit

No. 24001
DC No. A-152-67

United States of America,
Appellant,
vs.
State of Alaska, et al.,
Appellees.

APPEAL from the United States District Court for the District of Alaska.

JUDGMENT

This Cause came on to be heard on the Transcript of the Record from the United States District Court for the District of Alaska and was duly submitted.

On Consideration Whereof, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is set aside. The cause is remanded to the district judge to enter a summary judgment in accordance with the prayer of appellant's complaint.

A True Copy:
Attest: May 18, 1970
Wm. B. Luck, Clerk
William E. Wilson, Chief Deputy.

Filed and entered March 20, 1970
Wm. B. Luck, Clerk.
Filed May 27, 1970,
United States District Court,
District of Alaska.

Appendix E

United States Court of Appeals
Ninth Circuit

No. 24001

United States of America,	Appellant,
vs.	
State of Alaska, et al.,	Appellees.

ORDER

Before: Ely, Kilkenny and Trask, Circuit Judges.

The panel to which the case was assigned having voted unanimously to deny the petition for rehearing and to reject the suggestion for rehearing in banc; and all active members of the court having been so advised, and no judge having voted for a hearing in banc.

It Is Ordered, that the petition for rehearing is denied and the suggestion for hearing in banc is rejected.

Filed April 29, 1970,
Wm. B. Luck, Clerk.

Appendix F

ESTABLISHING THE KENAI NATIONAL MOOSE RANGE ALASKA

By virtue of the authority vested in me as President of the United States, it is ordered that, for the purpose of protecting the natural breeding and feeding range of the giant Kenai moose on the Kenai Peninsula, Alaska, which in this area presents a unique wildlife feature and an unusual opportunity for the study in its natural environment of the practical management of a big game species that has considerable local economic value, all of the hereinafter-described areas of land and water of the United States lying on the northwest portion of the said Kenai Peninsula, be, and they are hereby, subject to valid existing rights, withdrawn and reserved for the use of the Department of the Interior and the Alaska Game Commission as a refuge and breeding ground for moose for carrying out the purposes of the Alaska Game Law of January 13, 1925, 43 Stat. 739, U.S.C., title 48, secs. 192-211, as amended:

SEWARD MERIDIAN

Beginning at the point of intersection of the west boundary of the Chugach National Forest with the line of mean high tide on the south shore of Chickaloon Bay, in Turnagain Arm of Cook Inlet, in latitude 60° 53′N., and longitude 150° W.;

Thence from said initial point,

Northwesterly with the meanders of the line of mean high tide, on the south shore of Chickaloon Bay to Point Possession;

Thence southwesterly with the meanders of the line of mean high tide on the east shore of Cook Inlet to the Kasilof River;

Thence southeasterly, upstream along the right bank of the Kasilof River to the meander corner on the south boundary of sec. 33, T. 3 N., R. 11 W., Seward meridian;

Thence west, 4.09 chains, to meander corner on south boundary of sec. 32, T. 3 N., R. 11 W.;

Thence southwesterly, along the crest of the watershed, to the divide between the waters flowing into Tustumena Lake and the waters flowing into Cook Inlet and Kachemak Bay;

Thence southeasterly, along said divide to the confluence of the Fox River and the principal stream flowing from Dinglestadt Glacier;

Thence southeasterly, up said stream and across Dinglestadt Glacier to the crest of Kenai Mountains;

Thence northeasterly, along the crest of Kenai Mountains to the west boundary of Chugach National Forest at a point three miles southeasterly from the head of Upper Russian Lake;

Thence northerly, along the west boundary of Chugach National Forest to the place of beginning.

The area described, including both public and nonpublic lands, aggregates 2,000,000 acres.

None of the above-described lands excepting Tps. 5 N., Rs. 8, 9, 10, and 11 W., and also excepting a strip six miles in width along the shore of Cook

Inlet, extending from a point six miles east of Boulder Point to the point on Kasilof River intersected by said six-mile strip, shall be subject to settlement, location, sale, or entry, or other disposition (except for fish trap sites) under any of the public-land laws applicable to Alaska, or to classification and lease under the provisions of the act of July 3, 1926, entitled "An Act to provide for the leasing of public lands in Alaska for fur farming, and for other purposes", 44 Stat. 821, U.S.C., title 48, secs. 360-361, or the act of March 4, 1927, entitled "An Act to provide for the protection, development, and utilization of the public lands in Alaska by establishing an adequate system for grazing livestock thereon", 44 Stat. 1452, U.S.C., title 48, secs. 471-471o: *Provided, however,* That as to the foregoing excepted lands, primary jurisdiction thereover shall remain in the General Land Office of the Department of the Interior and their reservation and use as a part of the national moose range shall be without interference with the use and disposition therof pursuant to the public-land laws applicable to Alaska: *Provided further,* That the lands in the said excepted areas shall be classified by the General Land Office, Department of the Interior, and those lands classified as not suitable for settlement shall no longer be available for that purpose: *Provided further,* That the reservation for the national moose range shall not operate to prevent the construction and operation of a highway to connect the area open to settlement with the Seward-Sunrise road by the most practicable route: *Provided further,*

That any lands within the described area that are otherwise withdrawn or reserved shall be affected by this order only so far as may be consistent with the uses and purposes for which such prior withdrawal or reservation was made.

The provisions of this order shall not prohibit the hunting or taking of moose and other game animals and game birds or the trapping of fur animals in accordance with the provisions of the said Alaska Game Law, as amended, and as may be permitted by regulations of the Secretary of the Interior prescribed and issued pursuant thereto.

This reservation shall be known as the Kenai National Moose Range.

Franklin D. Roosevelt.

December 16, 1941.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 286

SUPREME COURT, U.S.
FILED
AUG 13 1970
E. ROBERT SEAVER, CLERK

STATE OF ALASKA; ROBERT ALLEN VENABLE, executor of the will and estate of R. H. Venable, deceased; and D. D. HARRINGTON,

Petitioners,

vs.

UNITED STATES OF AMERICA, ALASKA EXPLORATION CORPORATION,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF FOR PETITIONERS

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DENMAN-WALLEN PRINTING CO., SAN FRANCISCO, CALIFORNIA

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 286

STATE OF ALASKA; ROBERT ALLEN VENABLE, executor of the will and estate of R. H. Venable, deceased; and D. D. HARRINGTON,

Petitioners,

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Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF FOR PETITIONERS

ARGUMENT IN REPLY

Brief response to certain points raised in the Brief of the United States in Opposition to the Petition for a Writ of Certiorari is warranted.

1. At pages 4 and 5 of its Brief the United States asserts that the authority of the President to withdraw lands beneath Tustumena Lake so as to prevent vesting of title in the State of Alaska was not questioned below. Quite the contrary, the point was argued in the briefs of both the State and the private petitioners and was further discussed in oral argument

before the Court of Appeals. Indeed, the United States devoted the greater part of its Reply Brief for the Appellant before the Court of Appeals to arguments supporting the validity of the executive order of withdrawal.

2. The United States concedes that the question raised by the Petition has not been considered by the Court previously. It argues that other decisions of this Court are so closely analogous to the question presented here that the matter is settled.

But that is precisely the question. Is the simple declaration by executive order that lands underlying inland navigable waters in a territory shall be used for a certain purpose equivalent to creation of a reservation by treaty, grant or congressional withdrawal, thereby preventing the passage of title to a newly admitted state? If that question is answered affirmatively, the further question is raised whether creation of a wildlife range is the sort of public purpose to which land may be devoted so as to deprive a newly created state of such lands. Petitioner has found, and the United States has cited, no decision of this Court reaching these points.

3. Both the Court of Appeals and the United States seem to assume either that the Kenai Peninsula contains no non-navigable water or that moose require navigable water for their wellbeing. The fact of the matter is that the Kenai Peninsula contains a vast acreage of small ponds and marshes. The portion of the bed of Tustumena Lake accessible to moose is a minute fraction of the total area in question.

The fact that the Court of Appeals and the United States find it necessary to make assumptions regarding the terrain of the Kenai Peninsula and the habitat of the moose clearly shows the erroneous basis of their position. The question is one of title to land and how transfer of that title may have been affected by an act of the executive in 1941. The Court of Appeals and the United States apparently find the controlling issue to be the use to which the land is put—yet no evidence relating to such use was taken. Petitioners suggest that the record is inadequate to support the decision of the Court of Appeals on the basis stated in its Opinion, and that the issues framed by petitioners deserve consideration.

Respectfully submitted,

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ROBERT L. HARTIG,
JAMES D. RHODES,
Assistant Attorneys General,
Attorneys for Petitioner State of Alaska.
ROBERT C. ELY,
JOSEPH RUDD,
Attorneys for Petitioners Robert Allen Venable, executor of the will and estate of R. H. Venable, deceased, and D. D. Harrington.

August, 1970

In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 286

STATE OF ALASKA, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

This Court, on October 12, 1970, requested the parties to answer three questions:

(1) Must Congress authorize or ratify the withdrawal of territorial lands by the President?

(2) If so, did Executive Order No. 8979 have the necessary authorization or ratification? and

(3) Was this matter adequately raised below?

The United States submits the following answers:

1. It is not necessary for Congress to authorize or ratify the withdrawal of territorial lands by the President. This matter was fully considered in *United States* v. *Midwest Oil Co.*, 236 U.S. 459, where the

409-092—70

Court upheld the long practice by the Executive of both temporarily withdrawing and permanently reserving parts of the public domain.[1] Consequently, congressional authorization or ratification is not necessary for the validity of Executive Order No. 8979. See, also, *One Third of the Nation's Land*, a Report to the President and to the Congress, by the Public Land Law Review Commission, 1970, pp. 43-44, 52-56.

2. Even if it be assumed, *arguendo*, that congressional authorization or ratification is required, the 1941 withdrawal was authorized by the Pickett Act of June 25, 1910, 36 Stat. 847, 43 U.S.C. 141:

> The President may, at any time in his discretion, temporarily withdraw from settlement, location, sale, or entry any of the public lands of the United States, including Alaska, and reserve the same for water-power sites, irrigation, classification of lands, or other public purposes to be specified in the orders of withdrawals, and such withdrawals or reservations shall remain in force until revoked by him or by an Act of Congress.

No one contends the entire area encompassed by Executive Order No. 8979, comprising approximately 2,000,000 acres, has been irrevocably and permanently withdrawn. Therefore, the withdrawal falls squarely within 43 U.S.C. 141. Furthermore, as noted in *Udall v. Tallman*, 380 U.S. 1, 10-13, Congress was fully aware of the existence of Executive Order No. 8979 as recently as the late 1950's and thus ratified it by

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[1] Including, *inter alia*, executive orders providing for Bird Reserves, 220 U.S. at 470.

the reservation contained in the Alaska Statehood Act, 72 Stat. 339, which provides, in Section 6(e), that "*such transfer shall not include lands withdrawn or otherwise set apart as refuges or reservations for the protection of wildlife* * * *." [Emphasis supplied.] Clearly, the withdrawal was both authorized and ratified.

3. This matter was neither briefed nor argued in the courts below.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

WALTER KIECHEL, JR.,
Acting Assistant Attorney General.

EDMUND B. CLARK,
Attorney.

NOVEMBER 1970.

U.S. GOVERNMENT PRINTING OFFICE : 1970

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 886

STATE OF ALASKA; ROBERT ALLEN VENABLE, executor of the will and estate of R. H. Venable, deceased; and D. D. HARRINGTON,

Petitioners,

vs.

UNITED STATES OF AMERICA, ALASKA EXPLORATION CORPORATION,

Respondents.

SUPPLEMENTAL MEMORANDUM OF PETITIONERS

By Order of Court entered October 12, 1970, the parties were requested to file further memoranda concerning certain specified questions. Petitioners respond to those questions in the order posed.

(1) MUST CONGRESS AUTHORIZE OR RATIFY THE WITHDRAWAL OF TERRITORIAL LANDS BY THE PRESIDENT?

Yes. "Section 3 of Article 4 of the Constitution confers upon Congress exclusively 'the power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States.' " *Sioux Tribe of Indians v. United States*, 316 US 317, 324; See also *United States v. Midwest Oil Co.*, 236 US 459; *Wisconsin C. R. Co. v. Price County*, 133 US 496, 504; *Gibson v. Chouteau*, 13 Wall. (US) 92, 99.

The power may be expressly delegated to the Executive or the Executive may be granted the power by implication. In addition, the Executive may exercise the power, subject to ratification by the Senate, by virtue of his employment of the treaty power. On the other hand, no provision of the Constitution and no decision of this Court supports the proposition that the Executive has independent or inherent authority to withdraw lands within a territory.

The language of Article IV, Section 3 of the Constitution does not differentiate between "the territory or other property belonging to the United States" which lies within a state and similar property which lies in a territory or other national possession. Furthermore, the decisions of this Court make no such distinction.

The Organic Act organizing Alaska as a territory provided that the Constitution and laws of the United States would be generally applicable in the territory, and specifically prohibited the territorial legislature from passing laws "interfering with the primary disposal of the soil." (Act of August 24, 1912, 37 Stat. 512, Sections 3 and 9).

(2) DID EXECUTIVE ORDER NO. 8979 HAVE THE NECESSARY AUTHORIZATION OR RATIFICATION?

No - to the extent it may have attempted to withdraw the lands lying beneath the navigable waters of Tustumena Lake. It is important to bear in mind that this litigation concerns title to only the lands lying beneath an inland navigable waterbody, and that the questions posed by the Court's October 12, 1970 Order are somewhat broader in that they also appear to concern uplands.

As stated above, the authority of the Executive to withdraw land may arise because of express or implied delegation by the Congress, or by virtue of the exercise of the

treaty power and ratification by the Senate. The latter method is not in issue here.

Of the considerable number of statutes granting express authority to the President to make withdrawals of land for various purposes, only one, the Pickett Act, has any possible application to Executive Order No. 8979, but it is clear that it was not, in fact, the basis for the promulgation of that Order. The Pickett Act (Act of June 25, 1910; 36 Stat. 847, 43 USC 141 et. seq.) authorizes the President to make temporary withdrawals of public lands of the United States for enumerated purposes not applicable here, and for other public purposes. Unlike typical orders of withdrawal made under the authority of the Pickett Act, Executive Order No. 8979 does not refer to the Act. Further, a withdrawal under the authority of the Pickett Act may not preclude the making of locations for metalliferous minerals under the general mining laws (as amended August 24, 1912, 37 Stat. 497). Executive Order No. 8979 states no such exception.

More importantly, withdrawals under the Pickett Act are "temporary" and are not intended to constitute a permanent dedication of the land to a particular purpose. If the withdrawal were a temporary withdrawal under the authority of that Act, it cannot be said that it was the intention of the President permanently to withhold title to the bed of Tustemena Lake from the State of Alaska. It would, at most, constitute a form of encumbrance upon the lands, legal title to which would pass at statehood. The United States has not urged such a proposition.

Finally, the Pickett Act withdrawals apply only to "public lands of the United States." "The words 'public lands' are habitually used in our legislation to describe such as are subject to sale or other disposal under general laws." *Newhall v. Sanger*,

92 US 761; See also *Ivanhoe Min. Co. v. Keystone Consol. Min. Co.*, 102 US 167; *Leavenworth, L. & G. R. Co. v. United States*, 92 US 733; *Dootan v. Carr*, 125 US 618; Senate Report No. 857 to accompany H. R. 5538, 85th Congress – Second Session, quoted in 1958 U. S. Code Congressional and Administrative News at page 2233. Certainly lands beneath inland navigable waters, as well as tidelands, are not ordinary public lands. *Shively v. Bowlby*, 152 US 1. Further, tidelands and lands beneath inland navigable waters were specifically removed from the operation of certain disposal laws by the Act of May 14, 1898 (30 Stat. 409, 48 USC § 411) which statutorily adopted the doctrine that such lands were reserved for the future State of Alaska.

Executive Order No. 8979 may be viewed differently if it is claimed to have been made under a power to withdraw *impliedly* granted to the President by the Congress under the theory expressed in *Midwest Oil Co.*, supra. Petitioners do not contend that Executive Order No. 8979 is invalid in its entirety for lack of authority in the President to make such a withdrawal. Under the implied authority to make withdrawals of public lands, the President might validly withdraw uplands and lands beneath non-navigable waters for the creation of the Kenai National Moose Range. See *Midwest Oil Co. v. United States*, supra.; *Udall v. Tallman*, 380 US 1. Executive Order No. 8979, however, described only the outer perimeter of the area to be withdrawn and then provided a number of exceptions for areas within that perimeter. Clearly the Order does not purport to withdraw everything within that perimeter. Among the exceptions are "any lands within the described area that are otherwise withdrawn or reserved." Petitioners have urged, in the first instance, that there was no intention to withdraw the bed of Tustumena Lake, inasmuch as it was reserved for the future State of Alaska.

Even if such an intention can be supplied after the fact (as the United States apparently persuaded the Court of Appeals could be done) the President could not validly make such a withdrawal so as to prevent title from passing to the State of Alaska under the theory espoused by the United States. Neither the express authority of the Pickett Act nor any implied authority of the President to withdraw land from entry or sale has been held to carry with it the power to dispose of the land, i.e., to permanently sever it from the public domain. The authority to create Indian reservations by executive order was found not to authorize vesting the Indians, for whose benefit they were made, with any compensible interest in the land, and the reservations were terminable at the will of the government. *Sioux Tribe of Indians v. United States, supra.*, at 331. The granting of oil and gas leases was held not to be a "disposition" in *Udall v. Tallman*, supra., at 20, which distinguished that term from other words which implied permanent conveyance of title. Yet the United States has equated Executive Order No. 8979 with a disposition of the public domain, equivalent to a grant. (Brief for the United States In Opposition, p.5. The United States has misconceived Petitioners' position. Petitioners have argued that the Executive could neither withdraw nor grant the land in question except in certain limited circumstances.)

It is Petitioners' position, as expressed in the Petition originally filed herein, that this court has long recognized that lands beneath inland navigable waters are to be distinguished from ordinary lands within a state or territory and that, unlike ordinary uplands, ownership of lands beneath navigable waters is one of the attributes of sovereignty. *U. S. v. Texas*, 339 U. S. 707, 716-717. During territorial status, the United States holds the lands in trust for the future state, disposing of them only when necessary for certain limited purposes, *Shively v. Bowlby*,

152 U. S. 1, and only by making its intention to do so very plain, U. S. *v Holt State Bank*, 270 U. S. 49.

When Alaska entered the Union on an equal footing with the other states, it acquired certain property rights by virtue of its newly acquired sovereignty. While "equal footing" does not require economic equality;

"Yet the 'equal footing' clause has long been held to have a direct effect on certain property rights. Thus the question early arose in controversies between the Federal Government and States as to the ownership of the shores of navigable waters and the soils under them. It was consistently held that to deny to States, admitted subsequent to the formation of the Union, ownership of this property would deny them admission on an equal footing with the original States, since the original States did not grant these properties to the United States but reserved them to themselves." (citing cases.) *(U. S. v. Texas*, Supra. at 716.)

Prior to statehood, the United States owns or controls all of the land in a territory, including lands beneath navigable waters. It may generally dispose of the public lands as it sees fit. Lands beneath navigable waters, however, being of a special governmental nature, are held in *trust* for the future states. Notwithstanding the trust status of such lands, Congress does have the power to make grants of lands beneath navigable waters under certain circumstances. This concept was first announced, by way of dicta, in *Shively v. Bowlby*, supra., at 48 as follows:

"We cannot doubt, therefore, that Congress has the power to make grants of lands below high water mark of navigable waters in any territory of the United States, whenever it becomes necessary to do in order to perform international obligations, or to effect the improvements of such lands for the promotion and convenience of commerce with foreign nations and among the several states, or to carry out other public purposes appropriate to the objects of which the United States hold the territory."

Shively v. Bowlby, enunciates a theory by which Congress may dispose of lands beneath navigable waters prior to statehood. When the United States does effect a disposal of such lands, it has necessarily put it beyond its own power subsequently to pass title to those lands to the territory when the territory becomes a state. In this case there has been no grant to a third party and no reservation in favor of the third party. At most the United States has attempted to withdraw or reserve for itself. [1]

It should be borne in mind that the purpose of a withdrawal is to prevent some other disposition of the withdrawn land, which might be effected pursuant to the various public land laws such as the homestead laws. Where, as here, the land in question was not subject to the public land laws in the first place, the President should not be deemed to have attempted a meaningless act by including the lands beneath Tustumena Lake within the purview of his order.

If the limitations of *Shively v. Bowlby*, are meaningful, Congress itself could not have deprived the State of Alaska of title to the bed of Tustumena Lake and, of course, could not expressly or impliedly delegate the power to the Executive. Therefore, the President was without authority to withhold the lands from the State of Alaska and, if he attempted to do so, his order was ineffective to that extent.

Even, as the United States has contended, there is no restriction on the nature of the public purpose for which *Congress* may *grant* lands beneath inland waters prior to

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1. A similar issue is raised in *United States of America v. City of Anchorage, et al, No. 25011* and *Fish and Farm Products, Inc., et al v. City of Anchorage, et al No. 25029*, relating to tidelands within the City of Anchorage, which actions are awaiting decision in the United States Court of Appeals for the 9th Circuit.

statehood, Executive Order No. 8979 was ineffective as to the lands beneath Tustumena Lake because it was neither an act of the Congress nor a grant to another person.

If, as the United States has argued, Executive Order No. 8979 is to be construed as a grant, it must fail as to the lands beneath Tustumena Lake because the President had no authority to make such a grant.

If Executive Order 8979 is construed simply as a withdrawal, its purpose was to withhold from private entry those lands which were subject to private entry, and it must have been made upon the basis of an implied power; Petitioners have found no case in which the implied power to withdraw lands has extended to a withholding of title from a newly created state.

(3) WAS THIS MATTER ADEQUATELY RAISED BELOW?

The broad first question posed by the October 12, 1970, Order of the Court was not raised below. None of the parties have contended that the President lacked the authority to withdraw uplands, including lands beneath *non-navigable* waters, for the purposes stated in Executive Order No. 8979. Petitioners did raise below, and the United States defended, the issue of whether the Congress was required to, and did, authorize or ratify the purported act of the Executive in issuing Executive Order No. 8979, to the extent it may have applied to lands underlying Tustumena Lake.

Respectfully submitted,

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